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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-888

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAKER and MARION L. LEAKER, individually, on behalf of themselves and on behalf of all similarly situated plaintiffs,

Petitioners,

—v.—

INTERNATIONAL PAPER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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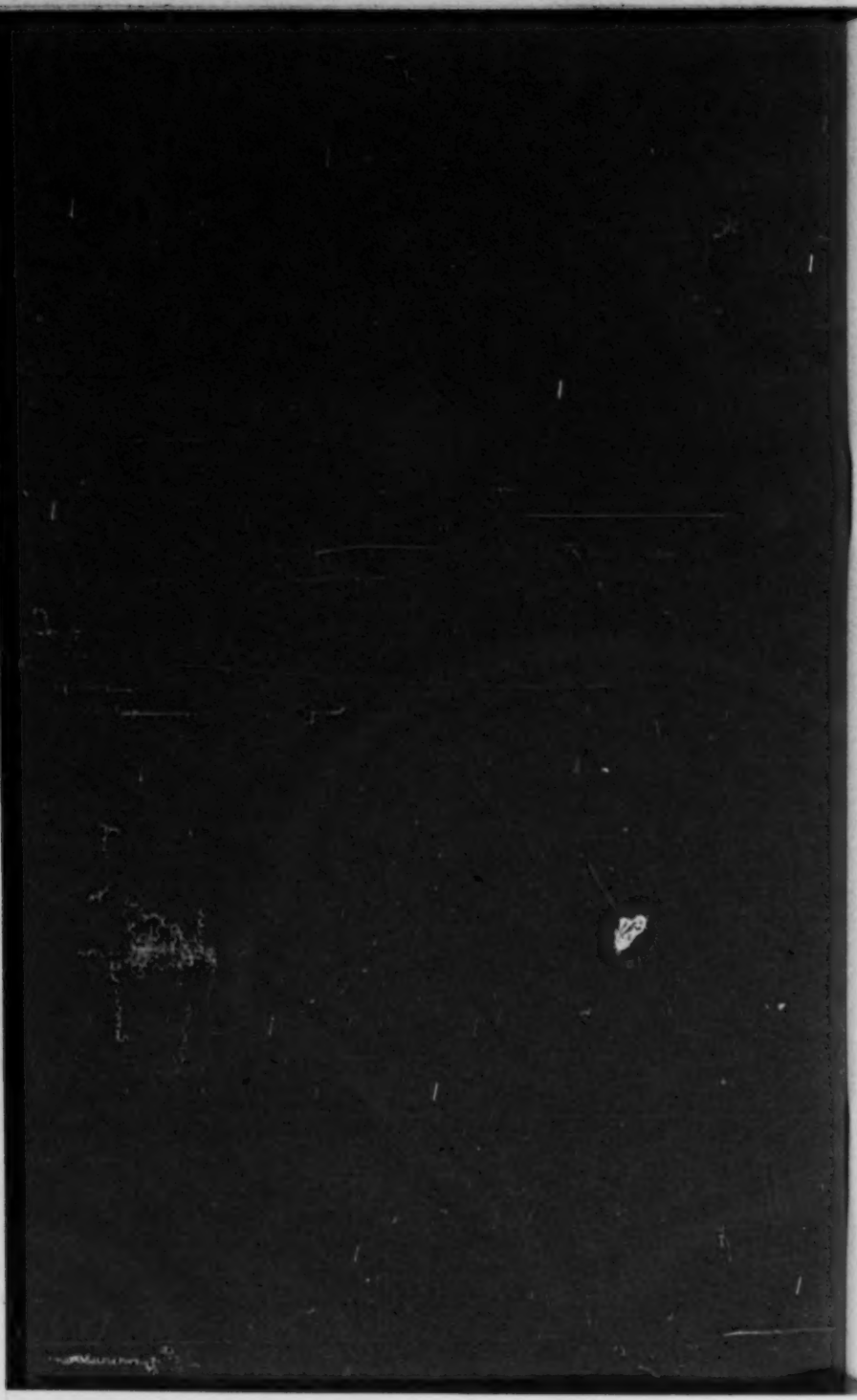

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In the

Supreme Court of the United States

October Term, 1972

No. 72-888

H. Keith Zahn and Valerie Zahn, Charles Leazer and Marion L. Leazer, individually, on behalf of themselves and on behalf of all similarly situated plaintiffs,

Petitioners,

v.

International Paper Company,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the United States District Court for the District of Vermont, which held that this action could not properly proceed as a class action, is reported at 53 F.R.D. 430. The affirming opinion of the United States Court of Appeals for the Second Circuit is reported at 469 F.2d 1033.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit became final on October 18, 1972. A Petition for Writ of Certiorari was filed December 16, 1972, and granted by this Court on February 20, 1973. The jurisdiction of this Court is based on 28 U.S.C. 1254(1).

Constitutional Provision, Statutes and Rules Involved

The relevant constitutional provision is Article III, Section 2, Clause 1, authorizing the establishment by Congress of the diversity jurisdiction of the district courts.

The relevant statutory provisions are 28 U.S.C. 1332(a) granting jurisdiction in diversity cases meeting the requisite "matter in controversy", and 28 U.S.C. 2072 prescribing the power of this Court to promulgate procedural rules.

The relevant Federal Rules of Civil Procedure are Rule 23 (class actions); Rule 24(a) (intervention as of right); and Rule 82 (providing that the Rules shall not extend or limit jurisdiction).

These provisions and rules are set forth in the Appendix to this Brief.

Question Presented

As stated by the Court of Appeals, the question presented is "whether a diversity case will be allowed to proceed as a class action under Fed.R.Civ.P. 23(b)(3) when the named plaintiffs meet the jurisdictional amount requirement of 28 U.S.C. § 1332(a), but the unnamed representatives of the class do not." 469 F.2d at 1033.

Statement of the Case

This action, brought by four named owners of lakefront property on the Vermont side of Lake Champlain on behalf of themselves and some 200 other similarly situated riparian landowners and lessees in a geographic area encompassing the towns of Orwell, Shoreham and Bridport in Addison County, Vermont (JA 7[1]), seeks compensatory and punitive damages for alleged injury to their properties and leaseholds caused by alleged discharges from the operation of Respondent's now-closed pulp and paper manufacturing plant at Ticonderoga, New York (JA 6-14). The action is apparently based on theories of common law trespass and nuisance and seeks to invoke federal jurisdiction on the basis of diversity of citizenship and requisite monetary amount under 28 U.S.C. § 1332(a) (JA 6-7). The complaint alleges that the four named plaintiffs each suffered damages in excess of $10,000 but contains no allegations as to the damages of the unnamed members of the proposed class (JA 7).

The District Court, treating this action as a proposed "'spurious' class action under Rule 23 before its amendment in 1966," held that it could not be so maintained, applying the principle of *Snyder* v. *Harris*, 394 U.S. 332 (1969) "that each class member in a spurious class action must independently satisfy the requirement as to jurisdictional amount." 53 F.R.D. at 431-32.

Judge Leddy found that in this case

> "[I]t is unlikely that the property of every lakefront landowner in the towns of Orwell, Shoreham, and Brid-

[1] References to (JA —) are to the pages of the Joint Appendix.

> port is valued at $10,000, and, to a legal certainty, it is not credible that every such owner has suffered pollution damage in excess of $10,000." 53 F.R.D. at 431.

Under these circumstances, he concluded that the problem of defining a class was "insuperable", that any attempted definition of the class before trial by requiring each member of the class to show the amount of his damages

> ". . . would eliminate any advantage of a class action over joinder" (53 F.R.D. at 431)

and that class action treatment would thus be improper under the Rule 23(b)(3) requirement that it be superior to other methods of adjudication.

Judge Leddy further concluded that definition of the class could not be postponed until after trial on the issue of liability because if liability were found not to exist

> "[T]he res judicata effect of the judgment would depend on an evaluation at some future date of whether a given class member had $10,000 in controversy at the time of this action." 53 F.R.D. at 433.

If, on the other hand, liability were found to exist,

> "[T]he question of jurisdiction would be hopelessly intertwined with the determination of damages". 53 F.R.D. at 433-34.

The Court held that such an *ex post facto* determination of whether a party had been a member of the class would be "an impossible task" and contrary to the purpose of amended Rule 23. 53 F.R.D. at 433.

The District Court's order was affirmed by the Court of Appeals for the Second Circuit on interlocutory appeal,

with one judge dissenting. The Court adopted Judge Leddy's analysis of this case as a proposed "spurious" class action and agreed with his conclusion that every member of plaintiffs' purported class could not conceivably allege damages of the requisite jurisdictional amount. 469 F.2d at 1033 n.1, 1034. While acknowledging that *Snyder* v. *Harris* does not explicitly hold that every unnamed member of the class in a spurious class suit must satisfy the jurisdictional amount, the majority considered that Petitioners' attempt to escape the reach of *Snyder* v. *Harris* by arguing that only some of the plaintiffs need meet the jurisdictional amount requirement—the same argument they make here—was met by "persuasive internal evidence" that this Court did not so limit the rule set forth in *Snyder* v. *Harris*. 469 F.2d at 1034-35.

The Court of Appeals noted that in *Snyder* v. *Harris* this Court "stressed that the aggregation doctrine, grounded in the statutory phrase 'matter in controversy,' far antedated Rule 23". The Court of Appeals observed that this

> "... Court's reliance on *Clark*[2] appears to offer an insurmountable obstacle to appellants, for the *Clark* Court had recognized that one originally named member of the proposed class might meet the jurisdictional amount requirement, just as the named plaintiffs do here; yet the action was dismissed as to all plaintiffs except that one." 469 F.2d at 1035 (footnote reference added).

As the Court of Appeals emphasized, the "point is that in a spurious class action one plaintiff may not ride in on another's coattails." 469 F.2d at 1035.

While recognizing that amended Rule 23 should be given a liberal interpretation in order to vindicate small federal

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[2] *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939).

claims, the Court of Appeals held that the policies underlying that Rule were not determinative of this case. Rather, the fundamental consideration had to be the restricted statutory grant of jurisdiction set forth in 28 U.S.C. § 1332 (a). The purpose of the jurisdictional amount requirement was found to be advanced by denying class action treatment here, for the class action—with approximately 200 separate and distinct property damage claims—would be "enormously time consuming". 469 F.2d at 1036. The Court of Appeals observed that "the Advisory Committee did not intend that Rule 23(b)(3) ordinarily be utilized in a mass tort situation," and further noted that this action was within the category of "local controversies involving claims to be settled on the basis of state law" which, as stated in *Snyder* v. *Harris*, " 'can often be most appropriately tried in state courts.' " 469 F.2d at 1036.

In dissent, Judge Timbers considered that class action treatment should be allowed under a theory of ancillary jurisdiction, reasoning that this result would be consistent with *Snyder* v. *Harris* if that decision were read not "for all it might be worth" but rather "for the least it has to be worth." 469 F.2d at 436. In his view, resort to ancillary jurisdiction would comport with the liberalized joinder practice under the Federal Rules of Civil Procedure. 469 F.2d at 436-38.

Summary of Argument

The diversity jurisdiction of the federal courts does not rest on discretionary considerations, but rather has been specifically limited by Congress to include only those plaintiffs whose claims meet the requisite jurisdictional "matter in controversy." The purpose of this restriction on jurisdiction is to relieve the federal district courts of the burden of adjudicating relatively small claims which can more appropriately be determined in state courts. A "spurious" class action, such as here proposed, is a form of permissive joinder of separate and distinct claims, each of which must independently meet this jurisdictional amount, whether asserted in a spurious class action or otherwise. This is the holding of *Snyder* v. *Harris* and consistent prior decisions of this Court. There is no basis here for departure from these principles.

The suggested use of ancillary jurisdiction to circumvent statutory jurisdictional limitations is improper and would, contrary to clear congressional intent, impose upon the already overburdened federal courts significant additional responsibilities for the resolution of small state claims. To prevent this additional burden and to preserve the necessary balance between state and federal judicial power, the "matter in controversy" requirement, as a jurisdictional limitation, must be strictly construed. Any change such as that advocated by Petitioners cannot be made by this Court, but only by Congress after full consideration of all relevant factors bearing on whether the district courts should be given jurisdiction of this type of case, including the resulting need for additional personnel, facilities and funds to handle increased caseloads.

As a matter of law, resort to ancillary jurisdiction to entertain diversity claims of spurious class members not exceeding $10,000 is impermissible because the spurious class action is a form of permissive joinder to which this doctrine has consistently been held inapplicable.

Ancillary jurisdiction is further inapplicable, again as a matter of law, because it may be exercised only within the confines of a unitary constitutional "case" or "controversy", the outer limits of which are defined by reference to the doctrines of *res judicata* and collateral estoppel. The claims of spurious class members each constitute separate and distinct constitutional "controversies", both by definition and because a purported class member denied participation in a spurious suit will not be bound by a decision adverse to the named plaintiffs.

Even if an exercise of ancillary jurisdiction in the case at Bar would not contravene applicable legal principles and policy considerations, it would nevertheless constitute an abuse of discretion. The separate and distinct claims presented in this case neither stem from a "common nucleus of operative facts" nor comprise an action which would normally be expected to be tried in one proceeding. Any application of ancillary jurisdiction, even assuming power to do so, would constitute a substantial and unnecessary expansion of that doctrine.

ARGUMENT

POINT I

THE COURT OF APPEALS CORRECTLY HELD THAT THE COMPLAINT DOES NOT PROPERLY ALLEGE A CLASS ACTION OF WHICH THE FEDERAL COURTS HAVE JURISDICTION.

A. *Constitutional and Statutory Limitations on Federal Diversity Jurisdiction Require That Each Claimant in a Spurious Class Suit Independently Satisfy the Requisite $10,000 Diversity Jurisdictional Amount.*

The diversity jurisdiction of the federal courts is constitutionally based on Article III, Section 2, Clause 1, which provides that "[t]he judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . ." With respect to this diversity jurisdiction, it is left "to congress to qualify the jurisdiction . . . in such manner as public policy might dictate." *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 334 (1816).

This Court consistently has held that a litigant's access to the district courts is only such as is provided by Congress. *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 234 (1922). Exercising its power to limit the jurisdiction of federal courts over diversity cases, Congress, in first authorizing district courts to hear such suits, fixed the requisite jurisdictional amount in controversy at $500. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78. This jurisdictional amount was raised in 1887 to $2,000 [Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552], in 1911 to $3,000 [Act of March 3, 1911, ch. 2, § 24, 36 Stat. 1091], and in 1958 to its present level of $10,000 [28 U.S.C. § 1332(a)].

This Court has also held that, in view of the constitutional and statutory basis of the "matter in controversy" provision in 28 U.S.C. 1332(a), it must be strictly construed. *E.g., Snyder* v. *Harris*, 394 U.S. 338-40; *Thomson* v. *Gaskill*, 315 U.S. 442, 447 (1942)—"The policy of the statute [conferring diversity jurisdiction upon the district courts] calls for its strict construction"; *Healy* v. *Ratta*, 292 U.S. 263, 270 (1934). One of the main factors behind this policy of strict construction is judicial recognition of the proper balance between state and federal judicial powers. *See Snyder* v. *Harris*, 394 U.S. at 340. As stated in *Healy* v. *Ratta*, 292 U.S. at 269-70:

> "Not only does the language of the statute point to this conclusion, but the policy clearly indicated by the successive acts of Congress regulating the jurisdiction of federal courts supports it . . . . From the beginning suits between citizens of different states, or involving federal questions, could neither be brought in the federal courts nor removed to them, unless the value of the matter in controversy was more than a specified amount. Cases involving lesser amounts have been left to be dealt with exclusively by state courts, except that judgment of the highest court of a state adjudicating a federal right may be reviewed by this Court. Pursuant to this policy the jurisdiction of federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount. The policy of the statute calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution . . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to

the precise limits which the statute has defined." (Footnote and citations omitted).

By definition the claims of purported spurious class members are "separate and distinct," as this Court noted in *Snyder* v. *Harris*, 394 U.S. 332, 335 (1969), in categorizing spurious class actions as "merely a form of permissive joinder" of parties with "separate and distinct" claims. 394 U.S. at 335. In dealing with permissive joinder of separate and distinct diversity claims, whether in the form of a spurious class suit or otherwise,[3] this Court has held that each such claim constitutes a "controversy" over which federal jurisdiction can be exercised only insofar as expressly permitted by Article III, Section 2 and 28 U.S.C. § 1332(a). For instance, in *Thomson* v. *Gaskill, supra*, in setting forth standards for use by the district court on remand to determine whether the requisite "matter in controversy" was sufficiently pleaded by plaintiffs, this Court stated:

> "Aggregation of plaintiffs' claim cannot be made merely because the claims are derived from a single instrument, Pinel v. Pinel, 240 U.S. 594 . . . or because the plaintiffs have a community of interest, Clark v. Paul Gray, Inc., 306 U.S. 583 . . . In a diversity litiga-

[3] Professor Moore likewise described the spurious class action as:

> ". . . a permissive joinder device . . . . There was no jural relationship between the members of the class; unlike, for example, the members of an unincorporated association, they had taken no steps to create a legal relationship among themselves. They were not fellow travelers by agreement. The right or liability of each was distinct. The class was formed solely by the presence of a common question of law or fact. When a suit was brought by or against such a class, it was merely an invitation to joinder—an invitation to become a fellow traveler in the litigation, which might or might not be accepted." 3 *J. Moore's Federal Practice*, Appendix ¶23.10[1] at pp. 23—2601-02 (2d ed. 1969).

> tion the value of the 'matter in controversy' is measured not by the monetary result of determining the principle involved, but by its pecuniary consequence to those involved in the litigation." 315 U.S. at 447.

Accord, Wheless v. *St. Louis,* 180 U.S. 379 (1901).

Thus, in order for a federal court to exercise its diversity jurisdiction over separate and distinct claims in a manner consistent with Article III, Section 2, and with 28 U.S.C. 1332(a) enacted by Congress pursuant thereto, the claim and underlying "matter in controversy" presented by each claimant must exceed the jurisdictional amount of $10,000.

This principle cannot be vitiated by procedural rules such as amended Rule 23. In granting to this Court the power to prescribe rules for the district courts, Congress specifically provided that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. 2072. This restriction is of course reflected in Rule 82 of the Federal Rules of Civil Procedure, which provides that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts. . . ." The diversity "matter in controversy" requirement is a jurisdictional limitation within the scope of Rule 82 that cannot be modified by procedural rule or judicial decision. *See Mississippi Publishing Corp.* v. *Murphee,* 326 U.S. 438, 445 (1946). This is the underlying thrust of this Court's more recent decision in *Snyder* v. *Harris, supra.*

Because constitutional and statutory limitations on federal diversity jurisdiction require the diversity jurisdictional "matter in controversy" to be independently satisfied by each "separate and distinct" spurious claimant, as discussed *infra* at pp. 13-22, and since the proscriptions of 28 U.S.C. 2072 and Rule 82 have been held to apply spe-

cifically to this "matter in controversy" requirement, the conclusion is compelled that procedural innovations under Rule 23 and the liberalized joinder provisions of the Federal Rules, so heavily relied upon by Petitioners and in the dissenting opinion below, cannot serve as a basis for exercise of federal diversity jurisdiction over spurious class members not alleging damages in excess of $10,000.

B. Snyder v. Harris *and Prior Decisions of This Court Require That in a Diversity Action Each Spurious Class Member Independently Satisfy the Requisite Jurisdictional Amount.*

It was against the backdrop of these fundamental jurisdictional principles that this Court in *Snyder* v. *Harris* held that where, as here, federal jurisdiction over a spurious class suit is sought to be based solely on diversity of citizenship and requisite jurisdictional amount, each plaintiff in the purported spurious class must in good faith be able to allege that he has incurred damages in excess of $10,000 in order to avoid a failure of jurisdiction as to him, because the separate and distinct claims of members of a spurious class cannot be aggregated to satisfy the "matter in controversy" requirement of 28 U.S.C. 1332(a).

In *Snyder* v. *Harris,* it was contended that even if aggregation were not permitted in pre-1966 spurious class actions, the substitution of a functional approach in amended Rule 23 for the former tripartite division of class actions into "true", "hybrid" and "spurious" categories was intended to abrogate the jurisdictional doctrine precluding aggregation in actions which would have been classified as "spurious" under former Rule 23. This Court firmly rejected this contention:

> "[T]he doctrine that separate and distinct claims could not be aggregated was never, and is not now,

> based upon the categories of old Rule 23 or any rule of procedure." (394 U.S. at 336)

and held that these jurisdictional restrictions were compelled directly by "this Court's interpretation of the statutory phrase 'matter in controversy' ". 394 U.S. at 336. This Court further reasoned in *Snyder* v. *Harris* that its prior judicial interpretations of the statutory jurisdictional phrase "matter in controversy" could not, as a matter of law, be negated by changes in Rule 23, because such negation "would clearly conflict with the command of Rule 82 that '[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . .' " 394 U.S. at 337.

In defining the scope of Congress' grant of diversity jurisdiction to the district courts, this Court in *Snyder* v. *Harris* adopted the language of an earlier decision predating original Rule 23 to emphasize the limited scope of this grant:

> "When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of *each* be of the requisite jurisdictional amount . . . " *Troy Bank* v. *G. A. Whitehead & Co.*, 222 U.S. 39, 40 (1911), cited in 394 U.S. at 336 (emphasis added).

The Court also cited another pre-1938 case containing almost identical language:

> "The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of *each* be of the requisite jurisdictional amount . . . " *Pinel* v. *Pinel*, 240 U.S. 594, 596 (1916), cited in 394 U.S. at 336 (emphasis added).

The Court used similar language to describe the doctrine as it continued to exist with respect to spurious class actions after the adoption of Rule 23 in 1938:

> "Under old Rule 23, class actions were divided into three categories which came to be known as 'true,' 'hybrid,' and 'spurious.' True class actions were those in which the rights of the different class members were common and undivided; in such cases aggregation was permitted. Spurious class actions, on the other hand, were in essence merely a form of permissive joinder in which parties with separate and distinct claims were allowed to litigate those claims in a single suit simply because the different claims involved common questions of law or fact. In such cases aggregation was not permitted: *each plaintiff* had to show that his individual claim exceeded the jurisdictional amount." 394 U.S. at 335 (emphasis added).

The application of this rule to class actions with exactly the same force as to joinder is illustrated by *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939), which, in this Court's words in *Snyder* v. *Harris*, applied "this doctrine [prohibiting aggregation] . . . to class actions under the then recently passed Federal Rules." 394 U.S. at 336-37.

> "Proper practice requires that where *each* of several plaintiffs is bound to establish the jurisdictional amount with respect to his own claim, the suit should be dismissed as to those who fail to show that the requisite amount is involved." 306 U.S. at 590, cited in 394 U.S. at 336-37 (emphasis added).

That this principle is fully applicable after 1966 is, of course, the holding of *Snyder* v. *Harris*.

Petitioners' argument that *Snyder* v. *Harris* is not applicable because of the existence in this case of named plain-

tiffs who meet the jurisdictional amount requirement is met, as the Court of Appeals noted, by " . . . persuasive internal evidence that the Court did not so limit the rule enunciated there." 469 F.2d at 1034-35. The Court of Appeals stated:

> "The Court [in *Snyder* v. *Harris*] stated the jurisdictional rule for the former spurious class action, unaltered by the amended Rule 23, to have been that '*each* plaintiff had to show that his individual claim exceeded the jurisdictional amount.' *Id.* at 335 . . . (emphasis supplied)." 469 F.2d at 1035.[4]

In explicitly stating in *Snyder* v. *Harris* that each plaintiff had to meet the jurisdictional amount, this Court cited with approval not only *Clark* v. *Paul Gray, Inc., supra,* but also *Alvarez* v. *Pan American Life Ins. Co.,* 375 F.2d 992 (5th Cir.), *cert. denied,* 389 U.S. 827 (1967), in which a proposed spurious class action was dismissed despite the ability of at least one member of the proposed class to satisfy independently the requisite diversity jurisdictional amount. This is hardly consistent with Petitioners' attempted distinction.

Further support for the proposition that the *Snyder* v. *Harris* decision is dispositive of the case at Bar, despite the fact that the named plaintiffs meet the jurisdictional requirement, is found in the dissenting opinion in *Snyder* v. *Harris,* which unequivocally stated that the rule against maintainability of spurious class suits set forth in the ma-

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[4] Prior to 1966 there could be no plaintiffs except named plaintiffs in a spurious class action because class membership was limited to the original parties and actual intervenors. *See, e.g., All American Airways, Inc.* v. *Elderd,* 209 F.2d 247 (2d Cir. 1954). There is thus no significance to this Court's applying this jurisdictional rule in *Snyder* v. *Harris* with respect to the former spurious class action to "each plaintiff" rather than each spurious class member.

jority opinion would apply "in all cases where one or more of the co-plaintiffs have a claim of less than the jurisdictional amount." 394 U.S. at 343.[8] This recognition that *Snyder* v. *Harris* applied equally to cases where some, but not all, plaintiffs met the jurisdictional amount, illustrates the "persuasive internal evidence" which establishes that the rationale of *Snyder* v. *Harris* was not to be limited to the precise facts of that case, but was applicable, in harmony with prior precedents such as *Troy Bank*, *Pinel* and *Clark*, to all situations of separate and distinct claims in diversity cases.

The principle that plaintiffs who have joined to assert similar but separate and distinct claims must each independently satisfy federal jurisdictional requirements is still further illustrated by prior decisions of this Court interpreting its own appellate jurisdiction when that jurisdiction was limited to review of lower court decisions where the "matter in dispute" exceeded a specified dollar amount. *See, e.g.*, Act of February 16, 1875, ch. 77, § 3, 18 Stat. 316 [$5,000 requirement]. A succession of cases, all decided pursuant to this provision, held that plaintiffs with separate and distinct claims, whether they initiated a joint suit or consolidated their separate suits for purposes of appeal, could not, through aggregation of the "matters in dispute" in their respective claims, bring themselves within the appellate jurisdiction of this Court: *Stewart* v. *Dunham*, 115 U.S. 61, 64-65 (1885); *Fourth Nat'l Bank* v. *Stout*, 113 U.S. 684, 686 (1885); *Hawley* v. *Fairbanks*, 108 U.S. 543, 548-49 (1883); *Adams* v. *Crittenden*, 106 U.S. 576, 577 (1882); *Farmers' Loan & Trust Co.* v.

[8] *Accord, City of Chicago* v. *General Motors Corp.*, 467 F.2d 1262, 1266 n.11 (7th Cir. 1972); *City of Inglewood* v. *City of Los Angeles*, 451 F.2d 948, 952-54 (9th Cir. 1971); *Dirks* v. *Thompson*, 414 F.2d 453, 456 (1st Cir. 1969).

Waterman, 106 U.S. 265, 270-71 (1882); and *Schwed* v. *Smith*, 106 U.S. 188, 189-90 (1882).*

In three of these cases, *Hawley*, *Waterman* and *Stewart*, this Court was faced with appeals from circuit court decisions in which certain of the joint plaintiffs had claims exceeding the requisite "matter in dispute" of $5,000 and others did not. In each instance this Court held that it had jurisdiction of only that portion of the appeal involving claims exceeding $5,000 and dismissed those portions of the appeal stemming from separate and distinct claims of a lesser amount. This Court's decision in *Stewart*, on appeal from judgments in favor of various appellees against the transferee of an alleged fraudulent transfer, is of particular interest. Only one appellee, Dunham, Buckley & Co., had a judgment in excess of $5,000. After accepting the contention of the other appellees "that, as to them respec-

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* Petitioners seek to support a contrary conclusion by drawing unwarranted implications from this Court's decision in *Sheppard* v. *Taylor*, 30 U.S. (6 Pet.) 675 (1831), a companion case to *Oliver* v. *Alexander*, 31 U.S. (6 Pet.) 143 (1832). Both these cases were decided under a statute limiting this Court's appellate jurisdiction to matters in dispute exceeding two thousand dollars. Petitioners note that in *Sheppard*, an appeal was brought jointly by members of a ship's crew to determine "whether the funds in the hands of the [shipowner's] assignees were liable" to their claims for back wages, and that no independent inquiry was made as to the ability of each seaman to assert a claim of the requisite amount. (Petitioners' Brief at 15-16). This was because, as Petitioners concede, appellants were jointly asserting a common right to a fund of assets, thereby necessitating resolution of the competing claims of the assignees and appellants to this fund. Such an action, if instituted in more recent times as a class action, would be classified as "hybrid". In the instant case, this Court is faced with a "spurious" class action involving separate and distinct claims by no means directed at a specific common fund. As shown by the cases cited above, this Court uniformly has refused to exercise appellate jurisdiction over separate and distinct claims unless each independently met the requisite appellate jurisdictional amount then required by statute.

tively, this court has no jurisdiction of the appeal, for the reason that the decrees in their favor are several, and that the amounts adjudged to be paid to them respectively do not exceed the sum or value of $5,000" (115 U.S. at 64), this Court first held that "the motion to dismiss the appeal as to all the appellees, except Dunham, Buckley & Co., must be granted" and then proceeded to reverse the judgment as to appellee Dunham, Buckley & Co. (115 U.S. at 65-67). This Court thus followed its statutory jurisdictional mandate, of a type virtually identical to the statutory "matter in controversy" jurisdictional mandate applicable here, in the face of rather compelling circumstances. Despite disagreeing with the Circuit Court on the merits of the judgments awarded in favor of all the appellees, this Court permitted all but one of these judgments to stand.

The decisions of this Court are uniform in holding that each separate and distinct claimant, whether in the context of a spurious class suit or otherwise, must independently satisfy jurisdictional amount prerequisites. *Snyder* v. *Harris* is the latest reflection of a substantial body of precedent reflecting an acceptance of congressional policy to impose a monetary limitation on the diversity jurisdiction of the district courts. Contrary to the suggestions in the dissenting opinion below and in Petitioners' Brief, there is no basis for limiting *Snyder* v. *Harris* or the long-standing jurisdictional principles which it reflects.

One of the principal purposes of the statutory jurisdictional amount requirement is to keep small claims out of the federal courts, except where some special federal legislation affords a basis for jurisdiction independent of any showing of requisite monetary amount. This purpose is evidenced by not only the $10,000 monetary amount required

under the diversity jurisdiction granted by 28 U.S.C. 1332(a),[7] but also by the inclusion of an identical monetary requirement in the general federal question jurisdiction granted by 28 U.S.C. 1331(a). *See, e.g., Snyder* v. *Harris, supra,* 394 U.S. at 339-40.

Congress set the present "matter in controversy" requirement at $10,000 in both these jurisdictional provisions on the basic premise that "[t]he jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies." S. Rep. No. 1830, 85th Cong., 2d Sess. (1958), reproduced in 2 U.S. Code Cong. & Adm. News 3101 (1958). As this Court stated in *Snyder* v. *Harris,* 394 U.S. at 341-2, "[i]f there is a present need to expand the jurisdiction of [federal] courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts." Any holding by this Court that spurious class members with minor claims may ride the jurisdictional coattails of class representatives will, of necessity, apply to all federal class actions subject to a jurisdictional amount irrespective of their subject matter. Furthermore, as pointed out in *Snyder* v. *Harris,* "[a]ny change in the doctrine of aggregation in class action cases under Rule 23 would inescapably have to be applied as well to the liberal joinder provisions of Rule 20 and to the joinder of claims provisions of Rule 18" and to practically any case in which "claims of any parties . . . for any reason happen to be brought together in a single action." 394 U.S. at 340. If any change in existing jurisdictional re-

[7] The case at bar involves state law damage claims, apparently sounding in nuisance and/or trespass, and not questions of "the purity of interstate waterways" which this Court, in *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 98 (1972), a *parens patriae* suit, held governed by federal common law.

quirements is to be made to meet any claimed special needs —whether in the environmental field or elsewhere—it is for Congress, rather than this Court, to do so, because only Congress is in a position to evaluate the desirability of expanding federal jurisdiction to meet such special needs and to solve the practical problems of such an expansion of jurisdiction in terms of providing required additional judicial and other personnel, required additional facilities and required additional funds.[8]

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[8] Congress has evidenced a continuing awareness of the obstacles posed to federal jurisdiction by "matter in controversy" restrictions and has extended or contemplated extension of federal jurisdiction to cover types of claims not previously covered where it has concluded that state regulation was insufficient. For instance, in the field of motor vehicle safety regulation, Congress, in October 1972, enacted the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1901 *et seq.*, which promulgates or authorizes promulgation of various motor vehicle construction standards and creates various federal causes of action, where none existed previously, to recover damages for losses stemming from non-compliance with these standards—*e.g.*, 15 U.S.C. §§ 1918, 1989. A litigant's recourse under these provisions is not conditioned on satisfaction of a jurisdictional amount.

In other fields, such as that of consumer protection, Congress has contemplated and at least temporarily rejected unlimited extension of federal jurisdiction. In October 1972, Congress enacted the Consumer Product Safety Act, 15 U.S.C. §§ 2051 *et seq.*, partially because it found that "control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers." 15 U.S.C. § 2051(a)(4). Aside from setting up an independent Consumer Product Safety Commission to regulate consumer product safety through promulgation and enforcement of appropriate standards, this Act provides, along with criminal and civil penalties, for private damage suits by persons injured by reason of knowing or willful violation of these standards. 15 U.S.C. § 2072(a). However, in this instance, Congress has seen fit to make such private actions "subject to the provisions of Section 1331 of Title 28 as to the amount in controversy." 15 U.S.C. § 2072(a). Thus, Congress is in favor of retention of jurisdictional amount requirements even in certain areas of regulation in which it deems the federal interest to be paramount.

Indeed, as Petitioners note in their Brief at 24 n.1, there is presently pending before the House of Representatives a bill (H.R. 4900, 93rd Cong., 1st Sess. (1973)) which would permit aggregation of claims in all federal class actions. If there is, as claimed by Petitioners, a compelling public need for the expansion of federal jurisdiction in environmental cases, Congress presumably will respond and provide the federal courts with the necessary funds, facilities and personnel to handle such cases. If Congress does not enact such legislation, then the urgency of the need for expanded federal jurisdiction in these areas will have been overstated. In any event, it is for Congress, not this Court, to determine if a problem exists and, if so, to determine the appropriate solution.

Finally, the case at Bar is a most inappropriate vehicle for any broadened judicial interpretation of jurisdiction in the area of federal class actions. The unnamed members of the proposed class in this case cannot possibly be prejudiced by the decision below because they are at liberty to litigate their various claims in the Vermont state courts[9] and could seek to invoke Vermont's class action statute[10] which is almost identical to amended Rule 23 and is applicable to the Vermont county courts which have jurisdiction of all claims exceeding $200.[11] International Paper Company is amenable to the jurisdiction of the Vermont courts. Thus, there is no basis for any attempted relaxation of long standing jurisdictional requirements in this case.

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[9] Virtually all states now have some form of class action device. *See* G. I. Strausberg, *Class Actions and Jurisdictional Amount: Access to a Federal Forum—a Post* Snyder v. Harris *Analysis*, 22 Am. U. L. Rev. 79, 93 n. 90 (1972).

[10] Vt. Stat. Ann. R. C. P. Rule 23 (1971).

[11] *See* Vt. Stat. Ann. T. 4 §§ 113, 437 (1971-72).

POINT II

USE OF ANCILLARY OR PENDENT JURISDICTION TO ENTERTAIN THE SEPARATE AND DISTINCT CLAIMS OF SPURIOUS CLASS MEMBERS WHO FAIL TO MEET THE REQUISITE DIVERSITY JURISDICTIONAL AMOUNT WOULD CONTRAVENE CONTROLLING CONSTITUTIONAL, STATUTORY AND DECISIONAL PRINCIPLES AS WELL AS APPLICABLE POLICY CONSIDERATIONS.

A. *Resort to Ancillary Jurisdiction to Entertain Diversity Claims of Spurious Class Members Not Exceeding $10,000 Is Impermissible Because the Spurious Class Action Is a Form of Permissive Joinder to Which This Doctrine Has Consistently Been Held Inapplicable.*

In an obvious effort to circumvent the statutory "matter in controversy" requirement, Petitioners resort to a theory of ancillary jurisdiction to permit, by indirection, the adjudication of claims which are not within the statutory jurisdiction of the district court. This is clearly improper because this case, though brought as a proposed spurious class action, is indistinguishable from the situation of permissive joinder of separate and distinct claims, as to which ancillary jurisdiction has long been held to be inapplicable.

Fundamental to this Court's decision in *Snyder* v. *Harris* was its treatment of "spurious" class actions as "merely a form of permissive joinder" thus requiring "each plaintiff . . . to show that his individual claim exceeded the jurisdictional amount." 394 U.S. at 335. Because the spurious class action is simply one form of permissive joinder called into operation solely by the presence

of common questions of law or fact, the courts have enforced far more stringent jurisdictional requirements for this category of class action than for its "true" and "hybrid" counterparts. Indeed, if the class were "true" or "hybrid", other members could intervene as of right under Rule 24(a) without regard to their citizenship, C. Wright, *Federal Courts* § 72 at pp. 271-72 (1963 ed.). In such actions, the rights of class members with respect to the *res* would be affected. Accordingly, the court had to utilize its ancillary jurisdiction to allow such members to participate because the decision of the court with respect to them would be binding. *See Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356 (1921) (hybrid);[12] *Stewart* v. *Dunham,* 115 U.S. 61 (1885) (hybrid); *Dickinson* v. *Burnham,* 197 F.2d 973 (2d Cir.), *cert. denied,* 344 U.S. 875 (1952) (hybrid); *Boesenberg* v. *Chicago Title & Trust Co.,* 128 F.2d 245 (7th Cir. 1942) (true).

However, a judgment in a "spurious" class action bound only those persons named as parties and other persons who participated in the judgment by permissively joining under Rule 20 or permissively intervening under Rule 24

[12] Insofar as the *Ben-Hur* and *Stewart* decisions permit intervention without respect to diversity of citizenship in "hybrid" actions, they may no longer be sound law. In *Ben-Hur,* this Court held that a federal district court could enjoin members of what under 1938 would have been categorized as a "hybrid" class from prosecuting suits in state courts which would relitigate questions settled by its previous decision in their class suit. In a subsequent decision, *Toucey* v. *New York Life Ins. Co.,* 314 U.S. 118 (1941), this Court rejected its *Ben-Hur* holding insofar as it authorized a federal court to enjoin a proceeding *in personam* in a state court on grounds of prior adjudication of "hybrid" claims with respect to the same property by a federal court, thereby making unnecessary exercise of ancillary jurisdiction over intervenors in "hybrid" suits on grounds that decisions in such suits would be binding as to them given their inability to assert their rights in a subsequent state action.

(b). Ancillary jurisdiction was not considered to extend to permissive joinder under Rule 20(a) or permissive intervention under Rule 24(b), and parties seeking to intervene in or join a spurious class had to establish independently all jurisdictional requirements, including diversity and requisite monetary amount. *See Fulton Nat'l Bank* v. *Hozier*, 267 U.S. 276 (1925), discussed *infra* at pp. 25-26, 32; C. Wright, *supra*, § 72 (1963 ed.). *See also*, Note, *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 874, 941-42 (1958); Comment, *Diversity Requirements in Multiparty Litigation*, 58 Colum. L. Rev. 548, 559-60 (1958).

Petitioners, in seeking to draw an analogy from this Court's refusal to require complete diversity of citizenship in hybrid actions such as *Stewart* and *Ben-Hur* (Petitioners' Brief at 11), overlook the critical distinction between (1) permissible extension of federal jurisdiction where essential to resolution of a unitary "case" or "controversy" involving disputed title or conflicting claims to a *res*, and (2) the quite different situation of impermissible extension of federal jurisdiction to cover separate and distinct claims (whether in the context of a "spurious" class suit or otherwise) which neither independently satisfy federal jurisdictional prerequisites nor are directed at a particular unitary *res* or *corpus*.

This Court has applied this distinction in holding that where, as in a "spurious" class action, an intervenor's claim is neither directed at or against a particular *res* or *corpus* of assets nor asserted by way of intervention into a federal proceeding in which rights to the *res* or *corpus* are being conclusively adjudicated, the intervenor must independently satisfy federal jurisdictional requisites. For example, in *Fulton Nat'l Bank* v. *Hozier*, 267 U.S. 276 (1925), a Georgia

claimant sought to intervene in a receivership proceeding to assert a claim against assets of the company in receivership on deposit in a Georgia bank. This Court, pointing to the lack of diverse citizenship between the proposed intervenor and the bank and to the fact that the former's claim had no direct relation to the assets being administered by the receivers, held that federal jurisdiction over this claim, ancillary or otherwise, was lacking:

> "The general rule is that when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; *but no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit. Hoffman* v. *McClelland,* 264 U.S. 552, 558 . . . ." 267 U.S. at 280 (emphasis added).

The rule of *Fulton* has been followed by all circuits which have passed on this issue, with the exception of the Tenth. The Second Circuit, in *Hackner* v. *Guaranty Trust Co. of New York,* 117 F.2d 95, 98 (2d Cir.), *cert. denied,* 313 U.S. 559 (1941), held that in a spurious class suit all purported class members must independently satisfy diversity jurisdiction prerequisites, despite the fact that a named plaintiff's claim exceeds the requisite jurisdictional amount. *Accord, Steele* v. *Guaranty Trust Co. of New York,* 164 F.2d 387 (2d Cir. 1947), *cert. denied,* 333 U.S. 843 (1948). The Third, Fifth, Sixth, Ninth and District of Columbia Circuits have reached similar conclusions. *Koster* v. *Turchi,* 173 F.2d 605 (3d Cir. 1949), *aff'g* 79 F. Supp. 268 (E.D. Pa. 1948); *Alvarez* v. *Pan American Life Insurance Co.,* 375 F.2d 992 (5th Cir.), *cert. denied,* 389 U.S. 827 (1967); *Newsom* v. *E. I. DuPont de Nemours & Co.,* 173 F.2d 856

(6th Cir.), *cert. denied*, 338 U.S. 824 (1949); *McGrath* v. *Tadayasu Abo*, 186 F.2d 766 (9th Cir.), *cert. denied* 342 U.S. 832 (1951); *Knowles* v. *War Damage Corp.*, 171 F.2d 15 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 914 (1949). *Contra, Amey* v. *Black*, 234 F.2d 12 (10th Cir.), *cert. granted*, 352 U.S. 888 (1956), *joint motion for dismissal granted*, 355 U.S. 600 (1958).

Most commentators have joined with this weight of judicial authority in rejecting the notion that unnamed members of a spurious class can participate in such an action without independently satisfying diversity jurisdictional requirements. For instance, Professor Wright states:

> "Ancillary jurisdiction does not apply to joinder of parties under Rule 20; no matter how closely related the matters may be, a party whose citizenship is wrong or whose claim is for less than the jurisdictional amount cannot be joined in a suit with a party who satisfies federal jurisdictional requirements." C. Wright, *Federal Courts* § 9 at p. 21 (2d ed. 1970).

See also, H. Kalven & M. Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684, 704 (1941); Comment, *Diversity Requirements in Multi-Party Litigation*, 58 Colum. L. Rev. 548, 559-60 (1958). Indeed, Professors Hart and Wechsler have questioned whether the Supreme Court, in view of prevailing doctrines of ancillary jurisdiction, would uphold "so bald an enlargement of federal jurisdiction". *The Federal Courts and The Federal System* 937 (1953 ed.). Similarly, in Note, *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 874, 942 (1958), it is stated that:

> "There seems to be little reason to distinguish intervention in spurious class actions from other situations

> of permissive intervention, or to distinguish the spurious class action itself from permissive joinder. The application of the ancillary-jurisdiction concept in spurious class actions seems to undercut those cases which hold that the concept cannot be applied when these other devices are used."

Ancillary jurisdiction is therefore unavailable to provide jurisdiction over separate and distinct claims which do not independently meet statutory jurisdictional requirements. Petitioners point to no decision of this Court which casts doubt on this well settled principle. Rather, in seeking to avoid the rule of *Snyder* v. *Harris* and other decisions requiring each member of a proposed spurious class independently to meet jurisdictional requirements, Petitioners contend that spurious actions are today "more properly analogous to intervention as of right under (amended) Rule 24(a)(2)" than to permissive joinder and argue that proposed class members therefore need not independently meet the requisite jurisdictional amount. (Petitioners' Brief at 22-24).

This contention is incorrect because Rule 24(a)(2) is wholly inapplicable here. The requirement of subsection (2) that "the applicant claims an interest relating to the property or transaction which is the subject matter of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest" is not, contrary to Petitioners' strained assertions, met by the unnamed members of the proposed class. While not contending that these proposed class members would in any way be bound under principles of *res judicata* by a judgment in a suit prosecuted individually by them, Petitioners nevertheless con-

tend that these proposed members will have their ability to protect their respective interests impaired or impeded "as a practical matter." (Petitioners' Brief at 23).

In pursuing this reasoning, Petitioners first suggest that a decision adverse to the named plaintiffs would have "probable" *stare decisis* ramifications in any subsequent suit instituted by a purported class member judicially excluded from the class. But the very nature of claims asserted respectively by "spurious" class members, which are by definition "separate and distinct", rebuts this contention. The District Court described Petitioners' proposed class suit as "a diversity action in which the plaintiffs seek compensatory and punitive damages for impairment of their property rights . . . ." 53 F.R.D. at 430. Hence, the pivotal issue to be resolved in passing on the merits of each proposed class member's claim is whether there has been undue and unlawful interference with and damage to his property rights. Such a determination will necessarily rest, at least in substantial part, on the facts particular to each proposed class member's situation such as the location and use of his property, the length of ownership and numerous other factors peculiar to specific parcels of real estate. *See* pp. 42-43, *infra*. Under such circumstances, the doctrine of *stare decisis* has no application:

> "In view of the fact that stare decisis is concerned with rules of law, a decision depending on the facts is not controlling precedent as to a subsequent determination of the same question on different facts and a different record . . . ." 1B *J. Moore's Federal Practice*, ¶0.402[2] at p. 117 (2d ed. 1965).

Petitioners next contend that "[M]any state court judges might be unwilling to rule independently on a question

before them that had already been decided by a federal court." (Petitioners' Brief at 23). Even assuming the validity of this broad assertion and its relevance to a determination of status to intervene as of right, the fact remains that the respective separate and distinct claims of Petitioners' purported class members pose unique questions for resolution in a particular factual context. Hence, federal resolution of one or more of these claims could not preclude or make unnecessary independent resolution of the remaining claims by a state court.

Finally, Petitioners contend that publicity surrounding trial of their action might adversely sway jury action in subsequent actions brought by the unnamed members of the proposed class. This is sheer speculation, but if this contention is to be given any weight, *voir dire* examination of prospective jurors, and not wholesale and unwarranted expansion of Rule 24(a)(2), is the solution.

We therefore submit that ancillary jurisdiction is inapplicable and cannot be used as a device to circumvent well-settled jurisdictional principles requiring each member of a spurious class to satisfy independently the monetary requirements of 28 U.S.C. 1332(a).

B. ***Any Judicial Application of Ancillary or Pendent Jurisdiction in the Spurious Class Context Would Contravene the Requirement That These Doctrines Be Used Only Within the Confines of a Unitary Constitutional "Case" or "Controversy".***

The term "ancillary jurisdiction" refers to the exercise of personal jurisdiction over additional parties asserting claims or defenses stemming from and within the confines of a constitutional "case" or "controversy" already before

the federal court for disposition. C. Wright, *Federal Courts* § 9 (2d ed. 1970). The purpose of the ancillary jurisdiction doctrine, as developed by this Court, is the preservation of federal jurisdiction over those "cases" and "controversies" embraced by Article III, Section 2, Clause 1, so as to permit the federal courts to adjudicate all essential elements of a "case" or "controversy", including non-federal aspects. *Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738, 819-25 (1824). *See Hurn* v. *Oursler*, 289 U.S. 238, 245-46 (1933). Accordingly, ancillary jurisdiction may be exercised only where necessary to preserve federal jurisdiction over the entirety of those "cases" and "controversies" placed by the Constitution and Congress within the subject matter jurisdiction of the federal courts.

The theoretical basis for such exercise of ancillary jurisdiction was set forth by Chief Justice Marshall in the landmark case of *Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824). There, this Court, in construing a statute providing that the Bank of the United States could "sue and be sued . . . in any circuit court of the United States" held, first, that this enactment rendered suits to which the Bank was a party "cases . . . arising under . . . the laws of the United States" within Article III's jurisdictional scope and, second, that this jurisdictional mandate could not be strictly confined to the resolution of abstract constitutional questions but necessarily had to be extended to the resolution of subsidiary legal issues "which depend on the general principles of law, not on any act of congress." Were it otherwise

> ". . . almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance

> to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the constitution, laws or treaties of the United States . . . ." 22 U.S. at 819.

The use of ancillary jurisdiction where necessary to fully adjudicate a constitutional "case" or "controversy" properly before the court, given satisfaction of jurisdictional prerequisites by original parties, subsequently was illustrated in the leading case of *Freeman* v. *Howe*, 65 U.S. 450 (1860), in which exercise of jurisdiction over ancillary claimants was premised on the notion that once federal jurisdiction exists to entertain claims of original parties to specific property under court control, the federal court must entertain all ancillary claims to the same property on the theory that:

> "Unless the federal court has ancillary jurisdiction to hear the claims of all persons to the property, regardless of their citizenship, some persons, with a valid claim to the property would be deprived of any forum in which to press the claim." C. Wright, *supra*, § 9 at p. 19 (2d ed. 1970).

This reasoning had been used by this Court not only to justify exercise of ancillary jurisdiction but also to define the proper boundaries of this exercise:

> "[N]o controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit." *Fulton Nat'l Bank* v. *Hozier*, 267 U.S. 276, 280 (1925).

Expanding the scope of permissible use of ancillary jurisdiction within the unitary constitutional "case" or

"controversy" context, this Court, in *Moore* v. *New York Cotton Exchange*, 270 U.S. 593 (1926), held that a federal court could exercise ancillary jurisdiction over compulsory counterclaims, on the theory that once there was federal jurisdiction over a constitutional "case" or "controversy", a federal court had to have the power to entertain on an ancillary basis all other claims, the subsequent litigation of which would be precluded if not raised in the context of the principal suit in the federal forum. Similarly, with the broadening of compulsory joinder of parties and claims under the Federal Rules of Civil Procedure, ancillary jurisdiction has been used to permit the joinder of claims which, if not asserted in the principal action properly before the federal court, would be barred from subsequent litigation.

Even as most broadly construed, however, the exercise of ancillary jurisdiction has consistently been held impermissible as to claims which are not required to be asserted in the principal action, but may be asserted elsewhere at the claimant's option. *See* discussion at pp. 23-28, *supra*. Thus, ancillary jurisdiction permits federal courts to hear compulsory counterclaims under Rule 13(a) and to bring in additional parties to respond to compulsory counterclaims under Rule 13(h), but has no application to permissive counterclaims under Rule 13(b). *Compare, e.g.*, *Moore* v. *New York Cotton Exchange*, 270 U.S. 593 (1926) and *Scott* v. *Fancher*, 369 F.2d 842 (5th Cir. 1966) with *Chance* v. *County Bd. of Trustees*, 332 F.2d 971 (7th Cir. 1964) and *Lesnik* v. *Public Industrials Corp.*, 144 F.2d 968 (2d Cir. 1944). Similarly, some courts have held that an intervenor as of right under Rule 24(a) may resort to ancillary jurisdiction because he must show that he

"claims an interest relating to the property or transaction" before the court and that his preclusion may prevent full vindication and enforcement of his rights in subsequent litigation, but that ancillary jurisdiction does not apply to the permissive intervenor under Rule 24(b). *Compare, e.g., Black* v. *Texas Employers Ins. Ass'n*, 326 F.2d 603 (10th Cir. 1964) and *Formulabs, Inc.* v. *Hartley Pen Co.*, 318 F.2d 485 (9th Cir.), *cert. denied* 375 U.S. 945 (1963) with *Babcock & Wilcox Co.* v. *Parsons Corp.*, 430 F.2d 531 (8th Cir. 1970) and *Olivieri* v. *Adams*, 280 F. Supp. 428 (E.D. Pa. 1968). Finally, under Rule 20, which deals with permissive joinder, as directly analogous to joinder of claimants in a "spurious" class, ancillary jurisdiction has no application, as discussed at pp. 23-28, *supra*.

There is no decision of this or any other court cited by Petitioners or in the dissenting opinion below which provides any precedent for the use of ancillary jurisdiction in a spurious class action. Rather, the use of ancillary jurisdiction has been limited to situations where its exercise was necessary to determine rights to specific property before the court or where, as in the case of compulsory counterclaims, substantial rights might otherwise be lost. An expansion of the hitherto limited doctrine of ancillary jurisdiction to encompass separate and distinct claims would constitute a serious judicial erosion of the settled jurisdictional principles discussed in Point I of this Brief.

Despite Petitioners' contention to the contrary, the related doctrine of pendent jurisdiction is equally inapplicable here. "Pendent jurisdiction", while sometimes categorized as a specialized form of ancillary jurisdiction, refers only

to the exercise of federal jurisdiction over a state law claim pendent to a federal claim, where both claims are asserted by the same party. The case at bar presents only state law claims, thus rendering pendent jurisdiction inapplicable. Furthermore, just as with ancillary jurisdiction, pendent jurisdiction, even where applicable, can be utilized only in the context of a unitary constitutional "case" or "controversy", and not in the context of an action comprised of separate and distinct claims. As this Court stated in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966):

> "Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ,' U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case'."

It is because separate and distinct claims cannot fall within a unitary constitutional "case" or "controversy" (*see* pp. 11-12, *supra*), that it has been similarly stated in *Hurn* v. *Oursler*, 289 U.S. 238, 245-46 (1933), that proper utilization of pendent jurisdiction

> "does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action."

The theory behind exercise of pendent and ancillary jurisdiction is essentially the same—once the federal court properly has jurisdiction over a constitutional "case" or "controversy", it must be permitted to resolve it in its entirety, whether this requires hearing a non-federal claim pendent

to a federal claim or requires, for example, the hearing of ancillary claims directed at property in the control of a federal court, regardless of the citizenship of the ancillary claimants or their ability to independently satisfy the requisite "matter in controversy." C. Wright, *supra*, § 9 at p. 19 (2d ed. 1970). Language in *Gibbs*, relied on by Petitioners, that under the Federal Rules "[j]oinder of claims, parties and remedies is strongly encouraged" (Petitioners' Brief at p. 19) must therefore be read in the light of the basic requirement that the entire action before the Court must comprise but one constitutional "case" or "controversy". It is only when this constitutional prerequisite is fulfilled that the courts may take into account "considerations of judicial economy, convenience and fairness to litigants" in utilizing pendent jurisdiction, which is a "doctrine of discretion." 383 U.S. at 726.

This Court in *Gibbs* noted that the *Hurn* doctrine, even as extended in *Gibbs*, was intended to restrict the application of pendent jurisdiction to those instances where the principal and pendent claims were potentially intertwined by *res judicata* and collateral estoppel considerations so that litigation of the principal claim might well have preclusive effect on subsequent litigation of the pendent claim. 383 U.S. 715, 723-24. It was by reference to these considerations that *Gibbs* defined the outer limits of a unitary constitutional "case" or "controversy". 383 U.S. at 723-24. It is because the state courts are constitutionally bound by the *res judicata* and collateral estoppel aspects of a federal judgment[13] that, in pendent or ancillary claim situations, the lower courts have, in accordance with *Hurn* and *Gibbs*, exercised federal jurisdiction over state claims, where the in-

[13] See 1B *J. Moore's Federal Practice* ¶0.401, p. 17 (2d ed. 1965).

dependent subsequent state court litigation of such claims would be restricted or partially precluded by the potential *res judicata* and collateral estoppel aspects of an adjudication of a related claim properly before the federal court.

In the instant case, the unnamed members of the proposed class will in no way be precluded by *res judicata* or collateral estoppel from complete litigation of their separate claims in a state court, even should the named plaintiffs lose on the merits. Neither *res judicata* nor collateral estoppel may be asserted defensively against a plaintiff who has had no opportunity to litigate his particular claim. *E.g., Hansberry* v. *Lee*, 311 U.S. 32 (1940). *See generally*, 1B *Moore's Federal Practice*, ¶0.411, p. 1252 (2d ed. 1965). Absent *res judicata* or collateral estoppel considerations, the doctrine of pendent or ancillary jurisdiction, even as most expansively construed, can have no application to the claims of purported spurious class members which fail independently to satisfy the requisite diversity jurisdictional amount. No constitutional "case" or "controversy" is here presented within even the most liberal interpretation of *Gibbs*.

Petitioners cite cases (Petitioners' Brief at 20-21) purportedly upholding federal ancillary jurisdiction over separate and distinct claims of proposed spurious class members who fail independently to satisfy the requisite diversity jurisdictional amount. But these cases are, with the possible exception of two district court decisions, all inapposite. The ancillary or pendent claims there presented, together with the "federal" claims properly before the Court, comprised but one constitutional "case" or "controversy" as defined by this Court in its *Hurn* and *Gibbs* decisions to embrace claims which were potentially intertwined by *res judicata* and collateral estoppel considerations.

Several of these cases involved derivative claims arising out of special "privity" relationships (*e.g.*, husband and wife, guardian and child, principal and agent)—not wholly separate and distinct claims as in the case at bar. For instance, in *Hatridge* v. *Aetna Casualty & Surety Co.*, 415 F.2d 809 (8th Cir. 1969), the Court retained jurisdiction over a wife's claim of less than $10,000 for loss of consortium, because it had jurisdiction over her husband's claim arising out of the same accident and because, under applicable Arkansas law, the wife's claim was entirely derivative to and contingent upon the success of her spouse's action. Similarly, in *Wilson* v. *American Chain & Cable Co.*, 364 F.2d 558 (3rd Cir. 1966), the Court retained jurisdiction over a father's own claim for less than $10,000 for his expenses stemming from personal injuries suffered by his minor son, because another claim he asserted as guardian on his son's behalf exceeded $10,000 and because applicable Pennsylvania law rendered the otherwise jurisdictionally deficient claim wholly dependent on the latter claim and required them to be tried together. *Wiggs* v. *City of Tullahoma*, 261 F. Supp. 821 (E.D. Tenn. 1966), applied ancillary jurisdiction to otherwise jurisdictionally deficient claims of three minor daughters suing by their parent as next friend because these claims had been joined with claims of the parent (and two other minor daughters) in excess of $10,000 arising out of the same automobile accident. In *Wiggs*, the Court noted with approval the "familiar rule that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount to be within the jurisdiction of the district court . . . ." 261 F. Supp. at 822.

In *Jacobson* v. *Atlantic City Hospital*, 392 F.2d 149 (3rd Cir. 1968), the Court retained jurisdiction over a claim

against a hospital for less than $10,000 because it was coupled with and derivative to a claim for over $10,000 asserted against a defendant physician who was an agent of the hospital. Similarly, in *Leather's Best, Inc.* v. *S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971), it was the principal-agent relationship between co-defendants which justified the Court's exercise of ancillary jurisdiction over a state tort claim against a pier operator which was appended to an admiralty claim against a carrier for breach of contract of carriage. The Court expressly recognized that the liability of the principal-carrier was derivative to that of the pier operator-agent, because the latter had custody of the shipment at the time of the loss. 451 F.2d at 811 n. 13.

The remaining appellate decisions cited by Petitioners likewise involved claims potentially intertwined by collateral estoppel considerations. In *F. C. Stiles Contracting Co.* v. *Home Ins. Co.*, 431 F.2d 917 (6th Cir. 1970), the Court retained jurisdiction over two insurers that, together with a third, against whom a claim of the requisite amount was alleged, jointly insured plaintiff under "three separate but identical" policies. 431 F.2d at 918. Collateral estoppel and *stare decisis* considerations were present because the main underlying legal issue was whether the agent representing all three insurers could orally extend policy coverage. In *Astor-Honor, Inc.* v. *Grosset & Dunlap, Inc.*, 441 F.2d 627 (2d Cir. 1971), the Court retained jurisdiction over an unfair competition claim asserted against one of three defendants alleged to have acted pursuant to an unlawful conspiracy, the other two defendants having also been charged with copyright infringement, a Lanham Act violation. The basic authority for the Court's decision was Section 1338(b) of the Lanham Act, 28 U.S.C. § 1338

(b), which expressly gives the district courts "original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim" under the Lanham Act. The Court took pains to note that a valid Lanham Act claim could probably have been asserted against this third defendant as well and that "precisely the same facts" would either support or defeat the unfair competition claim against him. 441 F.2d at 629-30. Under these circumstances, plaintiff would have been collaterally estopped from making out an unfair competition case against this third defendant in a subsequent state action, had it failed to do so against his two co-defendants in the federal forum.

Some support for Petitioners' contention may be found in *Lucas* v. *Seagrave Corp.*,[14] 277 F. Supp. 338 (D. Minn. 1967) and *Johns-Manville Sales Corp.* v. *Chicago Title & Trust Co.*, 261 F. Supp. 905 (N.D. Ill. 1966). However, these lower court decisions are contrary to the great weight of authority. They focused only on the procedural factors discussed in *Gibbs* and did not consider whether satisfaction of the paramount *Gibbs* prerequisite, the existence of claims comprising but one constitutional "case" or "controversy", had been satisfactorily shown. Indeed, the *Johns-Manville* decision which the Court in *Lucas* found "both persuasive and precisely determinative" (277 F. Supp. at 349), contains no discussion of the underlying facts

[14] In *Lucas*, the Court exercised pendent jurisdiction over the claim of one of several co-plaintiffs, this being the only one of a multitude of claims for under $10,000. The claims involved were all asserted by former employees claiming accrued benefits under a former employer's pension plan. Significantly, the Court refused to reach the question of whether the employees were collectively asserting a "single title or right" to a pension fund, or possessed merely separate and distinct claims. 277 F.Supp. at 348 n.13.

and acknowledges that its exercise of pendent jurisdiction over an otherwise jurisdictionally insufficient claim was "contrary" to "[t]he weight of authority" and based on facts which did not present "a typical ancillary jurisdiction situation." 261 F. Supp. at 906-07.

C. *Application of Ancillary Jurisdiction in This Case Would Constitute an Abuse of Judicial Discretion.*

Assuming *arguendo* that exercise of ancillary jurisdiction in the case at Bar is permissible as a matter of law, such exercise would nonetheless constitute a clear abuse of judicial discretion. As this Court noted in *Gibbs* in the closely related pendent jurisdiction context:

> "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." 383 U.S. at 726.

Ancillary jurisdiction should be even more restrictively exercised than pendent jurisdiction because the former necessitates not only the resolution of additional claims but also the bringing of additional parties before the court with resulting increase in the procedural and substantive complexities to be dealt with by the court. The considerations which have led this Court to apply a doctrine of strict construction to the statutes governing the jurisdiction of the district courts (see pp. 10-11, *supra*) apply with equal if not greater force to proposed expansion of the non-statutory doctrines of ancillary or pendent jurisdiction. *Gibbs* restricts use of pendent jurisdiction, even in the context of a unitary constitutional "case" or "controversy", to pendent claims derived together with principal claims from a "common nucleus of operative fact." 383 U.S. at 725. It has been held that the "common nucleus" requirement is fulfilled

when there is "identity of the facts in the state and federal claims." *Leather's Best, supra,* 451 F.2d at 809. Other decisions indicate that the federal and pendent state claims must arise from the same specific transaction or occurrence. *Wilson, supra,* 364 F.2d at 564. Still others focus on whether "the facts underlying the state and federal claims are identical." *Leather's Best, supra,* 451 F.2d at 811. For present purposes, however, it matters little which of these variations is used. The case at Bar fails to satisfy any one of them.

The critical problems raised by the case at Bar in terms of substantive difficulties and procedural manageability will involve determining (1) the effect, if any, of discharges from Respondents' now closed plant upon individual parcels along approximately 20 miles of Vermont lakeshore and (2) claimed diminution, if any, in the value of each such parcel. The litigation as to each parcel will involve separate inquiry into a number of issues which are critical, not merely to a determination of damages, but to the fundamental issues of defendant's liability for nuisance and/or trespass. These issues include, for example:

(a) the frequency and amount of deposits on each proposed class member's property;

(b) the source of these deposits;

(c) whether these deposits, assuming they have reached a proposed class member's property, have caused him to incur special damages of a type distinct from and an amount greater than those incurred by a somewhat broader segment of the population at large;

(d) whether a given class member is barred by prescription or related doctrines from recovery of damages;

(e) whether a given class member has in fact been precluded from his contemplated use of the waters adjoining his property;

(f) whether, with respect to each proposed class member, the balancing of the equities essential to judicial determination of the existence or absence of a private nuisance, which requires taking into account the underlying public policies of the State of Vermont, justifies his recovery of damages.[15]

The existence of these non-common issues suggests not only the absence of any "common nucleus" within the intent of the *Gibbs* rationale but also the failure of the case at Bar to satisfy the less restrictive requirement of Rule 23 (b)(3) "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members."

The Advisory Committee's Notes to new Rule 23, in discussing subdivision (b) (3), indicate that the requisite commonality of questions of law and fact is generally lacking in a mass tort case:

"A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." 39 F.R.D. at 103.

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[15] Under Vermont law, in balancing these equities, a court must be satisfied that plaintiffs have sustained special damages distinct from and greater than any which have been sustained by the public at large. *Roy* v. *Farr*, 128 Vt. 30, 258 A.2d 799 (1969); *Hazen* v. *Perkins*, 92 Vt. 414, 105 A. 249 (1918).

Class action treatment here, insofar as this case presents a predominance of non-common questions of liability with respect to each proposed class member's claim, would thus be inappropriate. Professors Wright and Miller, who are generally favorably disposed to the class action technique, state:

> "[T]he alleged tortfeasor's defenses may depend on facts peculiar to each plaintiff, creating a risk that they may be submerged by the overall magnitude of the litigation or that individual issues actually may predominate so that a class action really would not be economical or expeditious." 7A C. Wright & A. Miller, *Federal Practice and Procedure*, § 1783 at 115-16 (1972). (Footnotes omitted.)

Professor Moore also recognizes that class action treatment is inappropriate where judicial inquiry, of necessity, must focus on the effect of the defendant's conduct on each claimant:

> "... . [A] class action would probably not be appropriate solely because severable common legal or factual questions exist, unless the remaining half of the cause of action—the legal significance of the common fact situation, or the factual context which gave rise to the legal question—were either negligible or not in controversy.
>
> Thus, if the only facts which would need determination were, for example, the computation of damages, once it is determined that certain activities gave rise to liability, a class action would be suitable. See Brennan v. Midwestern United Life Ins. Co. (ND Ind 1968) 268 F Supp. 702. If, however, once it were established that liability would result from certain conduct, the existence of that conduct would have to be proven separately with regard to each class member, representative treatment would not be appropriate. Caceres

v. International Air Transp. Ass'n (SDNY 1969) 46 FRD 89, 12 FR Serv 2d 23b. 3, Case 14." 3B J. Moore, *Federal Practice* § 23.45 (2) n.56 (2d ed. 1969).[18]

The undesirability of any attempt to apply class action treatment here, even if this were jurisdictionally possible, was noted by the Court of Appeals below:

> "Once appellee's liability had been established, and even assuming that appellee's defenses would not vary as to different members of appellants' class, it would be an enormously time consuming task to assess the damages suffered by each of the 200 riparian landowners, each of whose claims is regarded as separate and distinct." 469 F.2d at 1036.

Thus, any application of ancillary or pendent jurisdiction in this case would be entirely inappropriate. If the unnamed members of the proposed class have any litigable claims, they should bring them, on a class action basis or otherwise, in the state courts of Vermont.

CONCLUSION

Under *Snyder* v. *Harris* and prior precedents of this Court, and in view of the clearly expressed congressional policy of limiting the diversity jurisdiction of the district

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[18] In 1972, the American College of Trial Lawyers, in its *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure*, strongly recommended that Rule 23(b)(3) be expressly amended to provide that:

> "Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members, if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate solely to the calculation of the amount of damage." *Id.* at 1.

courts, each claimant in this case must independently satisfy the statutory "matter in controversy" as a prerequisite to jurisdiction over his claim. There is no basis for departure from this principle or for the application of a theory of ancillary or pendent jurisdiction to achieve by indirection what cannot be done directly. This Court should therefore affirm the order of the Court of Appeals.

Dated: New York, New York
June 13, 1973

Respectfully submitted,

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APPENDIX

Texts of Constitutional Provision, Statutes and Rules Involved

Constitution of the United States—
Article III, Section 2, Clause 1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Statutes

28 U.S.C. § 1332(a)

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 U.S.C. § 2072

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Federal Rules of Civil Procedure

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are ques-

tions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in

individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe

those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural mat-

ters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 82. Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93.

Certificate of Service Under Rule 33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-888

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

WILLIAM H. LEVIT, JR., one of the attorneys for Respondent, International Paper Company, and a member of the Bar of this Court, certifies that on the 13th day of June, 1973 three copies of Brief for Respondent were served on Peter F. Langrock, Esq., Langrock and Sperry, Drawer 351, Middlebury, Vermont 05753, attorney for Petitioners, by depositing the same in a mail box maintained by the United States Postal Service at One Chase Manhattan Plaza, New York, New York 10005, with first class postage prepaid.

June 13, 1973

/s/ WILLIAM H. LEVIT, JR.

WILLIAM H. LEVIT, JR.